

Agnes Myles

31st January, 1760.

34

Unto the Right Honourable the Lords of Council and Session,

Wid. No. 26

Testament - Formalities

Johnston

Vol. 10

THE

PETITION

(*F.*)

OF

33

Agnes Myles, Daughter of Andrew Myles Baxter in Bittleessie, and Agnes Annan, Daughter of John Annan sometime Tenant in Kirktown of Cults,

Humbly sheweth,

THAT upon advising the prepared State in the Process of Reduction at the Instance of *James and Margaret Farmers*, challenging the Last Will and testamentary Settlement of the now deceased *Agnes Farmer* their Sister, in favours of the now Petitioners, her two Infant Grand-nieces and Name-daughters, your Lordships were pleased, by Interlocutor 19th January 1760, to find, "That the Testament was not regularly executed, and therefore reduced the same, and decreed."

Of

Of this Interlocutor the Petitioners humbly pray your Lordships Review. Even those of your Lordships who concurred in the Judgment, did it with Regret, from the just Conviction you had that you were thereby defeating a most rational and deliberate Settlement, executed by the Testatrix when of sound Judgment, and a disposing Mind, *intra familiam*, in favours of her two Infant Grand-nieces, her own Name-daughters; and as the same Motives will engage your Lordships Attention in the Review of this Interlocutor, the Petitioners are hopeful that you will yet find Cause to alter the same, and to allow the Testatrix's Will to regulate this her small Succession; the total Produce of which will not amount to more than 120 *l. Sterling*.

This last Will and Testament (for such is the Nature of it, though wanting the Nomination of an Executor,) is executed by two Notaries, and four Instrumentary Witnesses. But then it is material to observe, as appears from the Proof, that the Testatrix's Incapacity to execute the Testament herself, did not proceed from any Disability in respect of Sickness, Weakness of Body, or other such Cause, but in regard that she had never learned to write, and therefore, upon former Occasions, had been in Use to sign by Notaries, as is distinctly deposed to by *William Robertson* Writer in *Coupar*, Folio 10th of the printed State, who being formerly in Use to do Business for the Testatrix, and particularly acquainted with her, depones, That he himself had frequently signed as Notary for her.

In Settlements *intra familiam*; it does not appear to be in any Degree material why the Testator chuses to prefer one Relation to another, a Niece to a Sister, or a Grand-niece to a Niece. Freedom of Will in the Disposal of one's Effects, is one of the chief Benefits arising from Property, though, was it necessary to assign a Cause why the Testatrix chose to prefer these her two Infant Grand-nieces to her Brother and Sister,



ter, very reasonable Motives may be assigned to evince, that she did not dispose of her Effects in this Manner from mere Whim or Caprice, but upon solid and substantial Reasons. They were both her Name Daughters; one of them had been her Companion from her Birth, trained up in Family with her; they had nothing of their own to depend upon for their Education; her Brother and Sister were well advanced in Years, and abundantly capable to do for themselves; they had not lived in such Friendship with her as might have been expected from the Degree of Relation in which they stood; the Brother in particular had persecuted her deceased Husband with uncommon Severity for a very trifling Debt; the little Money she had was all her own Acquisition, and therefore she justly thought she might gratify her own Inclination in disposing of it to those of her own Relations who merited best at her Hands, and who stood most in Need of it. And such being the general Complexion of this Settlement, it will require something very strong to get the better of it, and to deprive those, whom she mean'd to prefer, from getting any Share of her Means.

Your Lordships have a full and distinct Account of the De-
funct's State of Mind, Judgment and Capacity, and of all that
passed in Relation to this Testament previous to the last Act
of executing the same, in the Deposition of the said *William
Robertson*, which, in Substance, imports, " That upon the
" 9th of *January* 1758, he was sent for to come to *Pittlesie*
" to make out *Agnes Farmer's* last Will and Testament, and
" to bring another Notary with him, which he accordingly
" did; that when he came into her Room, he found her in
" Bed; that she desired every Body but him to remove; that
" when by themselves, she told him distinctly how she was
" to settle her Affairs, and particularly that she was to leave
" her Money equally to the two Petitioners her Grand-nieces,
" with several other special Instructions, as pointedly deposed
" to

“ to by this Witness ; that he proposed to her to leave Part
 “ of her Money to her Brother and Sister, to both which she
 “ gave an absolute Negative, in respect of their Misbehavi-
 “ our to her and her deceased Husband ; that after the Deed
 “ was wrote out, he read it over to her, and asked her if it
 “ was agreeable to her Mind, to which she answered it was,
 “ and then proceeds to give Account how it was executed.”

Mr. *Robertson's* Testimony is in Part confirmed by the Oath of *William Finlay*, Fol. 14th, who gives Account of his being called to the Defunct the Morning of that Day she made her Testament ; that she told him she was to make her Testament, and had sent to *Coupar* to bring out Writers to execute the same, and desired him to stay and be a Witness thereto.

And this is further established by the Oaths of *Agnes Kinnier* and *Elspeth Cassils*, Fol. 18th, who plainly prove her Approbation of the Settlement she had thereby made, some Days after it had been executed, which, in the Sequel, will fall to be more particularly taken Notice of.

And all the Witnesses, with one Voice, concur in deposing, that she was at the Time, and during the remaining Days that she lived continued to be, as sound and distinct in her Memory and Judgment as she had been at any Period of her Life. There is but one Witness who says any Thing to the contrary, viz. *Andrew Scot* the Surgeon, who did not see her till the Day after the Testament was executed, when she talked to him very sensibly ; but says, that having returned to see her about an Hour and a Half thereafter, he found her speaking incoherently and roving, and did not think her sensible. It is at best a mute Point whether this may not have been owing to her being at that particular Time dozing and half asleep, which is the more presumable ; for that all the other Witnesses, who had Occasion to see her both before and after, till the Hour of her Death, and amongst these the Minister, concur

cur in deposing, that from first to last she talked rationally and sensibly, and had the full Use of her Memory and Judgment.

The Pursuers therefore did not only fail in all their other Grounds of Challenge, but the Truth and Fairness of the Deed, as liable to no earthly Objection in any other respect, was established by as strong a Proof as has occurred in any Case.

The only other Exception taken to it, and which your Lordships have been pleased to sustain, arises from the Words of the Statute 1681, which after enacting, “ that only subscribing Witnesses, in Writs to be subscribed by any Party, hereafter shall be probative, statutes and declares, That no Witness shall subscribe as Witness to any Party’s Subscription, unless he then know that Party, and saw him subscribe, or saw, or heard him give Warrant to a Notar to subscribe for him ; and, in Evidence thereof, touch the Notary’s Pen, or that the Party did at the Time of the Witnesses subscribing acknowledge his Subscription, *otherwise the said Witnesses shall be reputed and punished as accessory to Forgery.*” And from the Depositions of three of the Instrumentary Witnesses, who, with some little Discrepancy in Substance, concur in deposing, that they neither heard what Answer the Testatrix made to the Questions put to her by the Notaries, nor did they see her touch the Pen, because the Body of the Notaries was between them and the Testatrix, nor did they hear her give Warrant to the Notaries to sign for her ; from all which the Pursuers were pleased to infer, that as these Instrumentary Witnesses, in Terms of the above recited Clause in the Statute 1681, were to be reputed and punished as accessory to Forgery, the Testament itself, as being unduly executed, could not be supported when thus disproved by the instrumentary Witnesses ; and this was the sole Foundation of your Lordships Judgment by the above recited Interlocutor.

B

Before

Before that the Petitioners proceed to the Argument upon this Point, they will beg Liberty to lay before your Lordships, in one connected View, such Parts of the Proof as respect the Execution of this Testament, as it cannot fail to give your Lordships full Satisfaction, and the most thorough Conviction, that nothing was intended but what was strictly regular; and that to all outward Appearance, the Testatrix had Reason to think that her Testament was in every Particular fair and unexceptionable.

William Robertson, Writer in *Coupar*, after giving Account of his being sent for by the Defunct, for the special Purpose of executing her last Will, of the Conversation that past between them, of the Instructions he received from her, of the particular Articles of which the Testament was to be composed, of his making out the Will in Terms thereof, of his reading it over to her, and of her expressing her Satisfaction therewith, he proceeds in deposing, " That the four instrumentary Witnesses were sent for, and came into the Room; that their Names were inserted in the Deed as Witnesses; that he went to the Bed-side; *and again read over the Deed distinctly with an audible Voice to the Defunct, the other Notary, and Witnesses*; that he then asked the Defunct, *with an audible Voice, so as the Witnesses might hear*, if the Deed was wrote according to her Mind, and if she was pleased with it; to which she answered, *yes, yes*; that he then asked her if she could write her Name, to which she answered, *no*; that he then said to her *audibly, so as the Witnesses might hear*, you give me Commission then, before thir Witnesses, to sign for you; and having a Pen in his Hand, reached it over to her, when she put her Hand forth from among the Cloaths, and took hold of it." He then proceeds to give Account, that *John Bonthorn*, (the Co-notary) who was standing at the Bed-side, " asked her also if she gave Commission to him before the Witnesses to sign for her, to which she

" answered

“ answered, *yes*; and he having reached his Arm to the Bed,
 “ with the Pen in his Hand, she likewise put forth her Hand
 “ and touched it; after which, he the Deponent wrote the
 “ Docquet, which was signed by him and the Co-notary,
 “ and the four instrumentary Witnesses.”

John Bonthorn, the Co-notary, *fol. 17.* gives much the
 same Account of what past upon that Occasion. He says,
 “ that after the four instrumentary Witnesses came in, *Robertson*,
 “ the other Notary, read over the Deed in Presence
 “ of the Witnesses, and again asked if she was pleased with
 “ the Deed; to which she answered, *she was*; and being as-
 “ ked if that was her latter Will and Testament, she answer-
 “ ed *it was*; and upon *Robertson's* asking her if she was wil-
 “ ling to sign it, *said she was*, but could not write; that *Ro-*
 “ *bertson* having held out the Pen to her, desired Power to
 “ sign it for her by touching the Pen, and saw her reach out
 “ her Hand from beneath the Cloaths of the Bed, and touch
 “ the Pen accordingly; that immediately thereafter, he the
 “ Deponent asked her if she was willing to give him Power
 “ also to sign for her, which she said *she was*, and thereupon
 “ took the Pen in her Hand, and delivered to him; that
 “ thereupon *Robertson* wrote out the Docquet, and both he
 “ and the Deponent, as Co-notaries, and the four instrumen-
 “ tary Witnesses, signed it.”

If these Witnesses have sworn true, which your Lordships
 will the more readily believe, for that the Pursuer has not of-
 fered the smallest Objection to their Character, or Suspicion
 of their Credibility, it is clear beyond Possibility of Cavil,
 that this Deed was executed seemingly in as fair, open, and
 candid a Manner, as possible; the two Notaries, and four in-
 strumentary Witnesses standing close together in a small Room
 where the Testatrix herself was lying in Bed; the Testament
 read over with an audible Voice, in Presence of the instru-
 mentary Witnesses, so as they *might* hear, and nothing at the
 Time.

Time said, importing that they did not hear; the Question audibly put to her, whether she was pleased with the Deed, and if that Will was her last Will and Testament, to which she answered in the Affirmative; a second Question put to her, with the same audible Voice, whether she was willing to sign the same, and whether she could write her Name, to which she answered, *she was willing to sign, but could not write*; a third Question put to her, with the same audible Voice, by the two Notaries, one after another, whether she was willing that they should sign for her, to both which she assented, first in Words, and then in Fact, by touching the Pen in the Hands of each of the Notaries successively. And thus the whole Ceremony being gone through with the greatest Exactitude, the four instrumentary Witnesses present, and standing close by, and to the Conviction of every other Person hearing and seeing all that past, the Docquet wrote out in the Presence of, and under the Eye of the Testatrix herself, and immediately signed by the Notaries and Witnesses.

But the Evidence of those Facts does not rest singly upon the Testimonies of the Notaries, for your Lordships have it in Proof, *Folio 13*, by the Oath of *John Smith*, who had been sent for, to be one of the instrumentary Witnesses, but who did not arrive till after the Deed had been read over for the second Time, and after that *Robertson*, the first Notary, had gone through his Part of the Ceremony. He depones, "That he heard *John Bonthorn*, the Co-Notary, say, "Goodwife, I suppose you are not in a Capacity, to sign this Paper, do you incline that I should sign it for you?" to which she "answered yea, yea, or yes, yes." How these Expressions should have been heard by this Witness, and not heard by the Instrumentary Witnesses, standing close by the Bed Side, all in a Knot, is inconceivable, unless it shall be supposed, that they wilfully shut their Ears, and closed their Eyes, or that their Forgetfulness may be presumed to proceed from a *non memini*; and this

this is the rather presumable, for that *James Ness* one of the instrumentary Witnesses, so far confirms what they have said, as he concurs in deposing, " That he heard Mr. *Robertson* " read over the Disposition, and turning to the Bed, asked " the Defunct if she could write, and if he should sign for " her; that being at a Distance, he did not hear her make " any Answer, but *saw her take the Pen from Mr. Robertson,* " and deliver it to Mr. *Bonthorn*, (the two Notaries) after " that Mr. *Bonthorn* had said, *if she pleased he would sign for* " *her.*"

Here then is one of the Instrumentary Witnesses approbatory of the Deed in every the minutest Article. He heard it read over; he heard the Question put to her by the Notaries one after another, if she could write, and if they should sign for her. He did not hear what Answer she made in Words, but he saw her take the Pen from the *one* Notary and give it to the other, upon those Questions being put to her. The Words of the Statute 1681 are, that the Witness must *see or hear* the Party give Warrant to the Notary, so that either seeing or hearing is sufficient. Words cannot be seen; a Nod of Assent has in other Cases been found to be sufficient. But the Touch of the Pen, which has been received into Practice, as the *evidentia facti* of the Parties meaning to authorise the Notaries to sign for the Party, is pointedly sworn to by this Witness; so that here are three concurring Witnesses, the two Notaries and this instrumentary Witness, in Part astricted by the Oath of *John Smith*, all concurring in affirming upon Oath, that this Testament was executed with all the Solemnities requisite, and in a fair overt Manner.

But the Matter does not rest here, for to all those the Petitioners will be allowed to add the Evidence arising from the Deed itself, subscribed by the two Notaries, and by the Four instrumentary Witnesses. The Docquet is in these Words, " *De mandato dictæ Agnetæ Farmer, scribere nescien. ut asserit.*

“ *calamumque manu tangen. nos Johannes Bonthorn et Gulielmus Robertſon, co-notarii publici in præmiſſis requiſiti pro illa ſubſcribimus ;*” as o which the Petitioners ſhall only obſerve, that however articulate the Notaries have been in this their Docquet, by engroſſing therein the *res vere geſta*, ſome of theſe particulars did not require to be expreſſly made mention of, particularly, her touching the Notaries Pen, in evidence of her Conſent, that they ſhould ſign for her ; becauſe, however true it is, that this Conſent and Authority muſt be ſignified in ſuch Way and Manner, either by Words or Deeds, as may certify the Notaries of her Conſent to the above Purpoſe, or as may ſatisfy a Court of Juſtice, that the Teſtatrix did truly conſent and authoriſe the Notaries to ſign for her, it is not eſſentially requiſite that her touching of the Pen, the Method uſually taken to ſignify the Conſent, ſhould be expreſſed in the Docquet : and your Lordſhips will ſee two ſeveral Deciſions in 1704 and 1710, Vol. 2d. Fol. 536, of the Dictionary, where it was *in terminis* found, that the Statute 1681 does not require the Notaries Atteſtation to mention the Solemnities, but that the ſame will be preſumed untill the contrary be proved. And Lord *Stairs* Lib. 4. Tit. 42, § 9, ſays, in expreſs Words, “ That the touching the Notaries Pen, is preſumed from the Notaries Aſſertion, unleſs the Writ be improven.” Whether, in this Caſe, the Deed is improven or approven, ſhall in the Sequel be conſidered.

But taking the Matter upon the Principles aſſumed by the Purſuers, *viz.* that the inſtrumentary Witneſſes are not barely Witneſſes to the Subſcription of the Notary, but alſo of the *res geſta*, and of every material Fact neceſſary to authoriſe the Notary's Subſcription for the Parties, the Subſcription of theſe inſtrumentary Witneſſes to the Notary's Docquet of the Tenor above recited, is a direct Acknowledgment upon their Part, that theſe Things were ſo done and tranſacted ; ſo that *prima facie* the Deed is compleat, regular, and formal, in all its

its Parts ; and if the instrumentary Witnesses had been dead, and no other Witnesses to be had present at the Time, to re-dargue these Facts, no possible Ground of Challenge could have lyen.

The Petitioners will at the same Time fairly admit, that whatever Doubts there might have been in ancient Times, whether the indirect Mean of Improbation could be allowed, when the direct was competent, the later Practice has with greater Justice and Reason abolished that Distinction, and whether the instrumentary Witnesses are dead or alive, has allowed every Mean of Proof direct or indirect to be taken, *ad rimandam veritatem*, in order to prove the Truth or Falsity of the Deed.

The instrumentary Witnesses of Deeds do presumptively astruck the same. But supposing the instrumentary Witnesses to be alive, and supposing them falsely to attest the Veracity of the Deed, to the Forgery of which they themselves had been accessary, which is not only a possible Case, but of which Examples have occurred, it can scarce admit of a Doubt, but that if, upon Trial, the Falsity of the Deed should be proved by Witnesses of greater Credit, by Writs, and other Circumstances evincing Falsehood, the Deed would be improven, though astrucked and supported by the instrumentary Witnesses, deposing to the Truth thereof.

And so on the other Hand, supposing the instrumentary Witnesses, either through *non meminis* and Forgetfulness, to disprove the Deed ; for Example, by denying their own Subscriptions, or that they saw the Party sign the same, or acknowledge his Subscription, it can as little admit of a Question, that the Deed might be astrucked by positive and more credible Proof, that the instrumentary Witnesses did truly subscribe the Deed, or that they saw the Party subscribe the same, or that in their Presence and hearing, he acknowledged his Subscription.

The

The Application of these Principles to the Case in Hand, will be extremely obvious and easy, after premising a few Observations upon the Testimonies of the other three instrumentary Witnesses, taking it alongst as expressly deposed to by the two Notaries, the fourth instrumentary Witness, and as a-
 structured in Part by the Oath of *Smith*, that the Testament was audibly read in the Presence and Hearing of all the Witnesses, that the above Questions were audibly put to her by the Notaries successively in the Presence and Hearing of the Witnesses, by which the Petitioners understand no more to be intended, but that these Witnesses being all in the Room, called in for that special Purpose, had thereby Access to hear and see what was transacted, equally well as any others in the Room at the Time, and were believed to have so seen and heard, that the Testatrix made the above Answers to the several Queries, that she touched the Pen successively to the different Notaries, and that thereupon the Notaries and Witnesses, in Presence of the Testatrix herself, retired to the Table in the same Room, and compleated the Deed, by their respective Subscriptions.

John Taylor, the first of these instrumentary Witnesses, Fol. 3d, so far concurs with the Notaries, &c. " That he heard
 " *Mr. Robertson*, one of the Notaries, read over the Dispo-
 " sition, and then turning to the Bedside, where the Testa-
 " trix was lying, heard him saying either I know you cannot
 " write, or asked her if she could write." But then he says,
 " That he did not hear her make any Answer, nor did he
 " hear any Orders given to either of the Notaries to subscribe
 " for her, nor did he see her touch the Pen, nor did he hear
 " *Mr. Bonthorn*, the other Notary, speak one Word, though
 " *Bonthorn* was standing at the Bed-side, and turned about to
 " the open Part of the Bed, and that he himself was standing
 " about two Yards only from *Bonthorn* the Notary." So that
 thus far he heard and saw, when looking with his Face to the
 Bed-

Bed-side where the two Notaries were ; and the Account that he himself gives, by what Means it should have happened, that he neither saw nor heard what more the other Witnesses have deposed to, is extremely remarkable, and shall be taken from the Witness's own Words, viz. " That he the Deponent " was then standing about the Distance of two Yards from " said *John Bonthorn* ; that where the Deponent was standing " at the Time the said Mr. *Robertson* and Mr. *Bonthorn* (the " two Notaries) went to the said *Agnes Farmer's* Bed-side, the " Deponent's Back was to the Bed, and though he had been " looking, he could not have seen the said *Agnes Farmer*, nor " any thing that was done by her, by Reason the said two " Notaries were betwixt him and her."

The smallest Attention must satisfy your Lordships, that this is a most extraordinary improbatory Witness. That his Memory has been extremely treacherous is evident from this, that he forgets the previous Conversation after reading the Deed, when *Robertson* the Notary asked the Testatrix, whether the Deed was made out to her Mind? and whether that was her last Will and Testament? to both which she assented in Words, at which Period there was nothing to intercept either his hearing or seeing; and yet he remembers nothing of this; and the Way how he comes not to hear and see what further past after that the first Notary had asked her Authority to sign for her, is said to be, that in the Middle of the Act, and after he had heard and seen as above, he turned his Back upon the Bed. This could not stop his hearing, however it might prevent his seeing, as he had not an Eye in his Neck. But then it will puzzle the Pursuers to account for the Reason he gives, why he could not have seen, supposing he had been looking, viz. that the Notaries Bodies were between him and the opening of the Bed. How could he see or know this, if at that Instant of Time his Back was turned upon the Bed? This surely does not hang well together.

The same Observation applies to the Oath of *James Smith* the next instrumentary Witness, though he also was standing within two Yards of the Notaries when they went to the Bedside. He heard Mr. *Robertson* read the Deed. He also heard him ask the Defunct if she could write; and further than this he neither saw nor heard, so far as he remembers, and does not even remember to have seen *Bonthorn* go to the Bedside, though this was seen by the former Witness.

Thomas Mackie the third Witness goes so much further than the former one, that he saw *Robertson* the Notary have a Pen in his Hand, which is more than *James Smith* remembers to have seen. He also remembers to have heard Mr. *Bonthorn* the other Notary speak to the Testatrix, though he does not know or does not remember what the Words were, as he was then standing at the Distance of four or five Yards from the Bedside. And the Reason this Witness assigns why he did not see what past between the Defunct and the Notaries is, that *Robertson's* Body intercepted his View.

Such being the Import of the Testimonies given by those negative instrumentary Witnesses, which in many Particulars is proved to be a plain *non memini*, and in Charity may be presumed to have been the same in other Particulars, the Petitioners will be pardoned to think it is as slight a Proof for destroying a Deed, in all other Respects so fairly executed, as has in any Case occurred, and would establish a Precedent which in many Cases would be attended with the most fatal Consequences, as well in Deeds signed by the Parties themselves, as in those which are executed by Notaries. A few Examples will demonstrate the Truth and Justice of this Observation.

Supposing two Witnesses called upon (as was the Case here) purposely to attest a Party's Subscription, and that they were actually in the Room when the Party signs, it's believed it would not enter into the Head of any Man to tell those Witnesses

nesses that was his Subscription, as he could not entertain the least Doubt that they knew it to be his when they were standing by at the very Time he subscribed ; and yet it is a possible Case, that these Witnesses, by wilfully shutting their Eyes, might be in Condition to swear that they did not see the Party subscribe.

Or, 2^{dly}, Suppose the Party had acknowledged to the instrumentary Witnesses that such was his Subscription, to which they were to sign as Witnesses, it would be a delicate Matter to reduce Deeds of the greatest Consequence upon one of two Witnesses saying, that he either did not see or did not hear what was said or done openly in his Presence.

Charity should construe this to be but a *non memini* ; but whatever might be presumed to have been the Cause of the Witness's so deposing, where can the Doubt be that other Proofs might be taken to astrue the Deed, by positive Evidence that Matters were so done and transacted as recited in the Deed itself, notwithstanding of the Witness's *non memini*, or their falsely swearing that they neither saw nor heard what by their Subscription to the Deed they did truly aver to be the Fact. If extraneous Proofs would be admitted to disprove the Deed, though supported by the Oaths of the instrumentary Witnesses, who may be supposed to swear falsely in some Cases, how much more ought such Proof to be taken to astrue a Deed in Opposition to the *non memini* of the instrumentary Witnesses, or even to their positive Averment to the contrary, whether proceeding from Forgetfulness or false Swearing.

And that is precisely the Case in Hand : So many of the Witnesses, it is true, have said, that they did not hear or did not see severals of these Facts, which by their Subscriptions to the Deed they have asserted they both saw and heard ; was this the only Proof, it might go far to destroy the Deed, even under such favourable Circumstances as here occur. But where the Verity of the Deed is *aliunde* astrued by so many other concurring

curing Proofs, and the positive Testimonies of four other Witnesses, present at the Time, it would be an extreme hard Case, to annul a Deed in every other respect to fairly executed, and thereby to overthrow a Party's last Will and Settlement.

And this leads the Petitioners to observe another Circumstance, which they are advised is the strongest Evidence of the Testatrix's Approbation of what was thus done, viz. what is deposed to by *Agnes Kinneir* and *Elspeth Cassils*, Fol. 18th of the State. The first of these depones, "That on the Saturday Night before *Agnes Farmer* died, she came into the said *Agnes Farmer*'s House, where she saw *Andrew Myles* (the Administrator under the Will) have a Paper in his Hands, which she took to be *Agnes Farmer*'s Testament, and heard her desire him to take good Care of it, and to take good Care of *Agnes Annan*," one of the Petitioners.

And *Elspeth Cassils*, the other Witness, gives Account, that the very same Night deposed to by the former Witness, "*Agnes Farmer* desired her Niece (*Andrew Myles*'s Wife) to bring her that Paper, and her Niece having asked what Paper it was, she replied the Testament; that the Niece gave it into her own Hands, and she delivered it to *Andrew Myles*, and said to him, take it, and God's Blessing with it, and desired him not to embezzle *Agnes Annan*'s Money."

Your Lordships cannot possibly entertain the least Doubt, from the Testimonies of these Witnesses, the Description given of the Deed itself, and the Expressions the Testatrix is proved to have used, that she held it as her Deed, and mean'd it should have effect; so that *esto* it had laboured under some Informalities in the Manner of executing, the after Assent and Approbation by the Testatrix herself, should, according to the common Rules of Law, purge away any such Defect.

The Petitioners will but mention one Case well known to some of your Lordships, in Support of the Principles above assumed,

assumed, viz. That tho' the instrumentary Witnesses should upon Oath deny their having seen the Party subscribe the Deed, or hear him acknowledge his Subscription thereof, this may be redargued, and the Verity of the Deed ascribed by collateral Proofs. The Case referred to was that of *Isabel Rolland* and her Husband, against *John Rolland* Maltster in *Calross*, which came the length of a printed State, where a principal Disposition being challenged upon this Ground, that the instrumentary Witnesses did not see the Defunct subscribe, or own his Subscription, and the instrumentary Witnesses having so deposed, your Lordships allowed a Proof to the Defender to ascribe the Deed; and the Proof came out pretty much of the same Nature with that which occurs in the present Case. The instrumentary Witnesses were proved to be in the Room when the Deed was signed, and seemingly to have been looking on when the Defunct was signing. The Act of seeing is incapable of any other Proof but being present at the Time, having Eyes in the Head, and an Opportunity to see. Neither is the Act of hearing capable of any other Proof. What the Issue of that Process was, the Petitioners are not particularly informed; that the Disposition was sustained, whether by Judgment of your Lordships, or by the other Party's departing from the Challenge, the Petitioners cannot possibly say; but whatever was the Event of that Process, it is so far apposite to the Case in Hand, as it establishes this Proposition, that the negative Testimonies of instrumentary Witnesses, denying their having seen the Party subscribe, or own his Subscription, may be redargued, and the Deed ascribed by other Proofs.

May it therefore please your Lordships, in respect of what is above represented, to alter your former Interlocutor, and to find the Reasons of Reduction not proven, and therefore to assilzie.

According to Justice, &c.

ALEX. LOCKHART.

25 June 1760

President adhere to the interloquutor, the case of a
Just: Clerk: from Defunct joined Probate
Nisbet, extraneous evidence sometimes to be admitted
& in this

The Lord adhere

may be required, and the Verity of the Deed is
collateral Proof. The Case referred to was that of
Rolland and her Husband, against the Defendant, who
Cable, which came the length of a printed sheet, and the
Criminal Disposition being charged upon this Ground, that the
instrumentary Witnesses did not see the Deed, but that the
own his Subscription, and the instrumentary Witnesses have
ing to deposed, your Lordship allowed a Proof to the De-
der to attack the Deed; and the Proof came out pretty much
of the same Nature with that which occurs in the present
Case. The instrumentary Witnesses were proved to be in the
Room when the Deed was signed, and seemingly to have been
looking on when the Deed was signed. The Act of being
is incapable of any other Proof but being present at the Time,
having Eyes in the Head, and an Opportunity to see. Not
that is the Act of being present, but the Act of being present
the issue of that Proof, the Petitioner is not particu-
larly informed; that the Disposition was furnished, whether
by Judgment of your Lordship, or by the other Party's de-
parting from the Challenge, the Petitioner cannot possibly
say; but whatever was the Event of that Proof, it is to be
opposite to the Case in Hand, as it establishes this Proposition,
that the negative Testimonies of instrumentary Witnesses de-
lying their having seen the Party subscribe, or own his Sub-
scription, may be required, and the Deed attacked by o-
ther Proofs.

May it therefore please your Lordship, in respect of
what is above registered, to allow your Lordship
Interlocutor, and to find the Reason of Petitioner
not proven, and therefore to dismiss.
According to Justice. Or
ALEX. LOCKHART.